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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 520

CORN PRODUCTS REFINING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 457

CORN PRODUCTS REFINING COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Corn Products Refining Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled consolidated cases on the 25th day of August, 1954. A petition for rehearing was denied September 27, 1954.

This is a reply brief to the memorandum for the respondent.

Commodity Futures Transactions

On the issue of whether Petitioner's dealings in commodity futures resulted in capital gains and losses or

ordinary income and deductions, Respondent, in his memorandum, makes two points:

> (1) That the decision of the court below was correct because the "taxpayer's purchases of futures did not constitute speculative transactions but were availed of in order 'to obtain business protection and to insure the profitable conduct of the business,' and that while not conforming to the technical definition of hedging, taxpayer's transactions were 'an integral part' of its manufacturing business and therefore comparable to hedges." and
>
> (2) That the decision of the court below is not in conflict with the cases of *Makransky* v. *Commissioner*, 154 F. 2d 59, *Commissioner* v. *Farmers and Ginners Cotton Oil Co.*, 120 F. 2d 772, and *Trenton Cotton Oil Co.* v. *Commissioner*, 147 F. 2d 33.

While the first point made by Respondent seems clearly irrelevant on a Petition for Certiorari, the complete answer to it is found in the *Makransky*, *Farmers and Ginners Cotton Oil Co.* and *Trenton Cotton Oil Co.* cases (*supra*), on which Petitioner herein relies. The facts in those cases indicate that, in the words of Respondent quoted above, the purchases of futures did not constitute speculative transactions, were availed of in order to obtain business protection and to insure the profitable conduct of the business, and, while not conforming to the technical definition of hedging, were an integral part of the business. The taxpayers in those cases engaged in commodity futures transactions in an attempt to meet a business situation that was facing them. They were trying to minimize the risk of loss in their business and thus to stabilize their profits, and, in the course of so doing, they were exercising what they considered sound business judgment. Unfortunately, both businesswise and taxwise, their operations did not amount to hedging and, as a consequence, the losses resulting from their

operations were held by the several Circuit Courts of Appeal to be capital losses and not ordinary deductions.

The second point made by the Respondent will not bear scrutiny.

Respondent distinguises the *Makransky* case on the ground that that case "involved only an isolated instance in dealings in futures and not as here the consistent practice of a manufacturer availing itself of regular and continuous dealings in futures 'for the purpose of stabilizing inventory costs.'"

While the futures purchases in the *Makransky* case were not many in number, actually they represented a completely integrated attempt on the part of a manufacturer to meet, for an entire year a business situation that was facing him as a result of war conditions, *i. e.*, a shortage of raw materials. As to whether the futures purchases were entered into for the purpose of stabilizing inventory costs, the fact is that they were entered into for the purpose of insuring availability of inventory and obviously cost must have been a prime consideration. In the instant case, Petitioner while engaging extensively in futures purchases did not do so continually but rather from time to time as situations developed and to meet those situations.

The Respondent concludes his remarks about the *Makransky* case by saying that the Tax Court found that the taxpayer there had not, in fact, hedged. That, of course, is the Petitioner's point in the instant case. It had not hedged.

All the Respondent says about the *Farmers and Ginners Cotton Oil Co.* case and the *Trenton Cotton Oil Co.* case is that the taxpayers in those cases had not in their futures purchases effected a hedge. That again is the

position of the Petitioner in the instant case. It had not in its operations effected a hedge, and, consequently, it seeks the same tax treatment for the results of its operations as was afforded to, or rather was imposed upon (since it was to Respondent's advantage to take that position), the taxpayers in those cases.

Respondent closes his remarks on this issue by stating that the fact that the Petitioner achieved only partial protection (protection against increases in the price of corn but not decreases) was not significant, since complete or only partial insurance is simply a difference in degree and not in kind. Whether the difference is called one of degree or one of kind would seem to be a matter of semantics, but to say that there is no significance in the difference, however labelled, is to deny the facts of business life. This is particularly true where, as in the instant case, there is protection against a price increase but not against a price decrease, and a price decrease is just as apt to occur as a price increase. Where there is a hedge, there is protection against both increase and decrease. Where there is not such protection, there is no hedge. That is the test that was applied in the *Makransky, Farmers and Ginners Cotton Oil Co.* and *Trenton Cotton Oil Co.* cases (*supra*), and that is the test that was not applied in the instant case. Therein lies the conflict.

Jurisdiction of this Court and of the Court of Appeals

As to the fourth issue, the Respondent's argument (page 17 of his memorandum) that the Tax Court's decision was correct is of no relevance here. The sole question is whether the Court of Appeals had jurisdiction to review the decision of the Tax Court. Contrary to what the Respondent says, there *is* a conflict between the decision below and the decisions of the Courts of Appeal in *Stimson Mill Co.* v. *Commissioner*, 163 F. 2d 269

(C. A. 9th), certiorari denied, 332 U. S. 824, rehearing denied, 332 U. S. 839; *Dowd-Feder, Inc.* v. *Commissioner*, 173 F. 2d 673 (C. A. 6th) and *Packer Pub. Co.* v. *Commissioner*, 211 F. 2d 612 (C. A. 8th). In each of these cases as in the present case, there was involved not the question of whether Section 711, 721 or 722 of the Internal Revenue Code of 1939 was applicable but rather whether the Appellate Court could review the Tax Court's decision with respect to a collateral consequence of the application of one of these sections; and in each of the cited cases, it was held that the Appellate Court did have power to review.

CONCLUSION

The petition for a writ of certiorari, as prayed for by petitioner, should be granted.

Respectfully submitted,

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Counsel for Petitioner.

Dated: January 4, 1955.